No. 3055.

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

The New York Central Railroad Company, a Corporation,
Plaintiff in Error,

vs.

Mutual Orange Distributors, a Corporation,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

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I.

STATEMENT OF THE CASE.

The plaintiff in error, a common carrier by railroad, transporting interstate commerce, brought this action to recover from the defendant in error the aggregate sum of $401.27, due as freight, refrigeration, car service, and other lawful tariff charges covering the transportation of 348 boxes, containing oranges, from

Cucamonga, California, to New York City. All charges applied to the shipment were strictly in accordance with the published tariffs and classifications in force and effect at the time and on file with the Interstate Commerce Commission. The oranges were delivered for transportation by the defendant in error to the agent of The Atchison, Topeka and Santa Fe Railway Company, a common carrier by railroad, at Cucamonga, California, on the *23rd day of January, 1913,* consigned to James A. Coogan at Kansas City, state of Missouri, and a standard form of straight bill of lading approved by the Interstate Commerce Commission covering such interstate shipment was issued by that carrier [11-19] and signed by the defendant in error as shipper [12].

Subsequently, (but before the oranges reached Kansas City) the defendant in error by successive diversion orders reconsigned them to itself to points in the states of Kansas, Iowa, Michigan and New York. The plaintiff in error in due coure of business received the shipment on its line of railroad at the city of Buffalo, and pursuant to the orders of the defendant in error transported it to New York City.

The complaint averred that under the constitution and laws of the United States, the plaintiff in error was bound to collect the charges and that the amount was due and owing under and in accordance with the terms and provisions of that certain act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto [10].

A demurrer was interposed to the complaint on the

grounds of insufficiency, uncertainty, want of jurisdiction of the court in that no federal question was involved, no diversity of citizenship existed, and also that the cause of action was barred by virtue of the provisions of subdivision I of section 338 and subdivision I of section 339, of the Code of Civil Procedure of the state of California [22, 23].

But two grounds were urged upon the attention of the trial court, to-wit:

(a) That the amount involved in the action was insufficient to confer jurisdiction upon the court; and

(b) The statute of limitations.

The demurrer was sustained generally, but the conclusions of the court as filed indicate that the ruling was based solely upon the jurisdictional question [28].

"Conclusions of the Court.

The case of Yazoo vs. Zemurray, 238 Fed. 789, is in point on the demurrer in this case, concerning jurisdiction. This being a decision of the Circuit Court of Appeals, and the other cases cited being simply decisions of the District Courts, it seems to me it is my duty to follow the Yazoo case. Besides, it seems to me to be based upon reason.

The plaintiff's attorney announced during the argument that he would not amend the complaint. The demurrer, therefore, will be sustained without leave to amend.

Oscar A. Trippet." [28.]

The court ordered that a judgment of dismissal be entered against the plaintiff in error. Exceptions

were taken to the court's ruling and order, and entered of record [25]. A writ of error was allowed [36, 37] and the case is here for review upon the following

SPECIFICATIONS OF ERROR.

1.

That the trial court erred in sustaining (generally) the demurrer to the complaint, and in ordering the dismissal of the action.

2.

That the trial court erred in sustaining the demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against the defendant in error, because the complaint contained appropriate allegations of the acts of defendant in error in delivering to The Atchison, Topeka and Santa Fe Railway Company, a corporation, for transportation, in interstate commerce, over the lines of that company's railway and its connecting lines, including plaintiff in error's lines of railway, the three hundred and forty-eight (348) boxes of oranges, and of the failure and refusal of defendant in error to pay the freight, refrigeration, car service, and other lawfully published tariff charges therefor (notwithstanding said oranges, at the special instance and request of the defendant in error, and in accordance with the agreement in writing evidenced by a bill of lading, signed by it [12], a copy whereof is attached to the complaint and made a part thereof [11-19], and pursuant to its several diversion orders, were transported from Cucamonga, California, to New York City), which the plaintiff in

error was (and is) legally bound to collect under the constitution and laws of the United States, in accordance with that certain act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, by reason whereof the complaint stated facts sufficient to constitute a cause of action against the defendant in error, and the first ground of the demurrer should have been overruled.

3.

That the trial court erred in holding it had no jurisdiction of the action on the ground that either no federal question was involved, or that no diversity of citizenship existed, so as to confer jurisdiction, because it affirmatively appeared by the allegations of the complaint that the controversy was wholly between citizens of different states [6] and the suit was brought to recover freight charges on an interstate shipment, was a suit to enforce a right of action created by a federal law, was a suit which clearly arose under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), Sec. 24, Subd. 8, 36 Stat. 1092 (Comp. St. 1916, Sec. 991, Subd. 8), giving the United States District Court original jurisdiction of suits and proceedings arising under any laws regulating commerce, and, therefore, the trial court did have jurisdiction over the parties to and the subject-matter of the action, and this was so irrespective of the amount in controversy or of the citizenship of the parties, and it should have so held.

4.

That the trial court erred in holding the complaint uncertain in that it could not be ascertained therefrom whether or not it was claimed that the defendant in error contracted to pay the freight or other charges sought to be recovered, by an express contract in writing, or whether it was claimed that such promise arose out of a parol agreement, or by operation of law, and in sustaining the demurrer on that ground, because the duty of the carrier to charge and collect the regularly established and published rate, and the corresponding obligation of the shipper to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379) and acts amendatory thereof and supplemental thereto, of which the complaint is predicated.

5.

That the trial court erred in holding the complaint uncertain in that it could not be ascertained therefrom to whom defendant in error agreed to pay freight charges on the shipment in the complaint described, and in sustaining the demurrer on that ground, for the reason that the bill of lading attached to and forming a part of the complaint (covering an interstate shipment) fixed the extent of the obligations of the defendant in error and all participating carriers insofar as the terms of said bill of lading were applicable [11-19], and because, under the Interstate Commerce Act, it became the duty of the plaintiff in error, as

the delivering carrier, to institute this action for the purpose of recovering all lawful freight and other charges due and owing from the defendant in error on account of said shipment of oranges.

6.

That the trial court erred in holding that the complaint was uncertain in that it could not be ascertained therefrom with whom defendant in error contracted both for the shipment of the goods and the payment of freight, and in sustaining defendant's demurrer to the complaint on that ground, because, under the Interstate Commerce Act (Act of February 4, 1887, c. 104, 24 Stat. 379), and acts amendatory thereof and supplemental thereto, a shipper who induces a railroad company to transport a shipment of freight in interstate commerce is liable for the lawful freight and other proper charges thereon, and any participating carrier may bring an action to recover such lawful freight charges.

7.

That the trial court erred in holding that the cause of action set forth in the complaint was barred by the provisions of Subd. 1 of Sec. 338 of the Code of Civil Procedure of the state of California, and also by the provisions of Subd. 1 of Sec. 339 of said code, and in sustaining said demurrer on that ground, for the reason that said cause of action was one to recover the freight charges on an interstate shipment arising under the constitution and laws of the United States, in accordance with the terms and provisions of an act of Con-

gress approved February 4, 1887, entitled "An Act to Regulate Commerce," and acts amendatory thereof and supplemental thereto, and pursuant to a written contract evidenced by a bill of lading, a copy whereof is attached to said complaint, marked "Exhibit A," expressly referred to and made a part thereof, bearing date January 23, 1913, executed within the state of California [11-19]; that if the time for the commencement of such an action is controlled by the statute of limitations of the state of California, then by the provisions of Subd. 1 of Sec. 337 of the Code of Civil Procedure of that state, an action upon any such contract, obligation or liability may be commenced within four years after such cause of action accrues, and further, because this action was commenced within four years from the 23rd day of January, 1913, to-wit, January 20th, 1917 [19].

8.

That the trial court erred in giving and entering judgment of dismissal of plaintiff's action for each and all of the reasons stated in the foregoing specifications of error, which, by reference, are made a part hereof to the same extent as if incorporated at length herein.

II.

ARGUMENT.

This suit was instituted to recover the carrier's charges on an interstate shipment due and owing under and in accordance with the terms and provisions of the acts of Congress regulating interstate commerce. The

suit was rightly commenced in the Federal Court, because paragraph eighth of section 24 of the Judicial Code expressly provides that the District Court shall have original jurisdiction:

> "Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court."

The Commerce Court was abolished by the act of October 22nd, 1913 (38 Stat. at Large 219) and the jurisdiction of that court transferred to and vested in the several District Courts of the United States.

It is no longer disputable since the amendment to the Interstate Commerce Act of February 4, 1887, by the act of June 29, 1906 (34 St. L. 584), and since the ruling of the Supreme Court of the United States in Adams Express Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 320, and St. Louis Etc. R. Co. v. Starbird, 243 U. S. 592, 61 L. Ed. 917, that Congress, pursuant to the powers conferred upon it by the federal constitution, has assumed and taken full jurisdiction of the subject of interstate commerce, and that this legislation supersedes all the regulations and policies of the several states upon the same subject.

By the provisions of that amendment, commonly known as the Carmack Amendment, a carrier is required to issue a bill of lading (as was done in the instant case) and it limits the power of such carrier to exempt itself by rule, regulation or contract. Prior to its adoption, neither uniformity of obligation nor of liability was possible, because some states allowed

the carrier to exempt itself from all or a part of common law liability, to adopt rules and regulations, and to make certain contracts,—while other did not. As was very aptly said by the court in So. Pacific Co. v. Crenshaw Bros., 5 Ga. App. 675, quoted in Adams Express Co. v. Croninger, *supra:*

> "The Federal Courts sitting in the various states were following the local rule, a carrier being held liable in one court when, under the same state of facts, he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another."

But in the new order of things, much of the old law and many of the old decisions have been superseded. Federal laws cannot be successfully administered unless there be uniformity of actions and decisions. The enactment of paragraph eighth of section 24 of the Judicial Code doubtless was for the purpose of securing this highly desirable result.

Is This a Suit Arising Under Federal Law?

Many tests have been applied to determine when a suit arises under a federal law. But, as we deduce the rule, it does not depend upon whether in the actual trial of the case a controversy will arise as to the

effect or construction of the Federal constitution or law.

It is sufficient if the complaint asserts a right created by Federal law.

M'Goon v. No. Pac. Ry. Co., 204 Fed. 998.

In that case Judge Amidon formulated a test which, as he says, goes far to harmonize the cases (many of which he cites) upon the subject. Particularly does he differentiate those cases where the federal question was only collaterally involved.

Prior to the adoption of the act of January 28th, 1915 (38 Stat. at L. 804), the national courts had jurisdiction of suits against railroad companies incorporated under an act of Congress.

Union Pac. Ry. Co. v. Myers, 115 U. S. 1, 29 L. Ed. 319;

Texas etc. R. Co. v. Cox, 145 U. S. 593, 36 L. Ed. 829;

Texas etc. R. Co. v. Cody, 166 U. S. 606, 41 L. Ed. 1132;

Texas etc. R. Co. v. Bigger, 239 U. S. 330, 60 L. Ed. 310.

The Federal Courts had jurisdiction of all actions under the Federal Employers' Liability Act until that jurisdiction was restricted by the act of April 5th, 1910.

Hall v. Chicago etc. R. Co., 149 Fed. 564;

Watson v. St. Louis etc. R. Co., 169 Fed. 942;

Cound v. Atchison etc. R. Co., 173 Fed. 527;

Clark v. S. P. Co., 175 Fed. 122;

Van Brimmer v. Tex. etc. R. Co., 190 Fed. 394.

A federal question arises *ipso facto* in a suit against a receiver of a national bank appointed by the comptroller of the currency.

McDonald v. Nebraska, 101 Fed. (8 C. C. A.) 171.

A suit to restrain the erection of a bridge over a public navigable stream in which it is averred that complainant claims the right to erect such bridge under a certain act of Congress, raises a federal question.

Hughes v. No. Pac. R. Co., 18 Fed. 106.

A suit to enforce the alleged liability in equity of a Kansas corporation upon the bonds of a railway company, created by an act of Congress, involves a question inherently federal in its nature, so that under the Judicial Code, Sec. 51, it may not, without consent of the Kansas corporation, be brought in any other federal district than that of its residence.

Male v. Atchison etc. Ry. Co., 240 U. S. (Feb. 21, 1916) 97, 60 L. Ed. 545.

These, as well as many other cases which might be cited, serve to establish and confirm our contention that this suit involves a federal question because the complaint declares upon and alleges a right and obligation created and imposed by an act of Congress.

The rates and charges filed and published pursuant to the provisions of Sec. 6, 34 Stat. at L. 587, measure the compensation which the carrier is entitled to receive and which the shipper is required to pay as the consideration for the transportation service.

The Interstate Commerce Commission is charged with the enforcement of the act to regulate commerce. By Sec. 4, 34 Stat. at L., p. 589, amending Sec. 15 of the Commerce Act, it is provided:

> "Sec. 15. That the commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this act, for the transportation of persons or property as defined in the first section of this act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; * * *"

The act of Congress further requires that the receiving carrier must issue a receipt or bill of lading for property to be transported in interstate commerce, and it is also made liable for loss or damage accruing on its line or on the line or lines of any other carrier to which the property may be delivered or over whose line or lines of railway it may pass. (34 Stat. at L., page 595.)

Obviously, therefore, every suit to recover freight is based upon the act of Congress. We do not look to the contents of the receipt or bill of lading to determine whether the claim for freight sued on is enforceable at law. We look to the acts of Congress and to the rules and regulations promulgated by the Interstate Commerce Commission thereunder, as well as to the rates, charges and classifications filed and published, to determine that question. We likewise consult the act of Congress to test the obligation of the shipper (where the action is brought by the intermediate or delivering carrier) to pay either to the intermediate or delivering carrier the lawful charges accruing on the shipment. We must look also to the act of Congress to test the right of the receiving carrier to secure reimbursement from the carrier on whose line or lines of railway loss or damage may have occurred. These considerations establish that a suit to recover freight involves a question inherently federal in character. The right of the plaintiff in error herein, as delivering carrier, to maintain this suit for freight charges against the defendant in error, as the shipper of the oranges, is claimed under the federal statute.

The District Court Had Jurisdiction of This Action in Virtue of the Provisions of Paragraph Eighth of Section 24 of the Judicial Code.

This paragraph has been construed in a number of cases to which we now direct attention.

Atchison etc. Ry. Co. v. Kinkade, 203 Fed. 165, was a suit between a corporation of Kansas and a

citizen of the same state, and was brought by the railway company to recover the sum of $143.71 as an undercharge, the difference between the freight paid on an interstate shipment and the amount due under the legally established and published rate schedules. Notwithstanding that no diversity of citizenship existed and that the amount involved was but $143.71, Judge Pollock held that pursuant to the provisions of section 24 of the Judicial Code, he had jurisdiction over the parties to and the subject matter of the controversy.

Reading at page 166 from the opinion, we find this pertinent language:

> "Exclusive jurisdiction of the controversy here presented has not been by law conferred upon the Commerce Court, nor is such contention made by defendant. The only question presented by the motion is: Does this action arise under the provision of any law of the United States regulating commerce between the states? In the absence of what is known as the Interstate Commerce Act (Act Fed. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901], p. 3154), the parties would have been free to make any contract they might desire covering the shipment of the emigrant goods of defendant, and such contract when made would have been binding and enforceable. No amount in excess of that stipulated in the contract would have been chargeable or collectible. However, the price to be paid for the performance of such service as is involved in this case is no longer a matter of private contract between the parties, but both the shipper and the carrier are alike bound by the established and published tariff rate made under the Commerce Act. No other amount may

be lawfully either charged, received, or paid. If a greater amount is charged and received, the shipper may recover the excess. If a less amount for any reason is paid by the shipper or received by the carrier, the difference between such amount and the legally established tariff rate may by the carrier be recovered from the shipper. In other words, the rate of carriage by law established, and not the acts or contract of the parties, must control. Texas & Pacific Railway Co. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011; Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Texas & Pacific Railway Co. v. Cisco Oil Co., 204 U. S. 449, 27 Sup. Ct. 358, 51 L. Ed. 562; Kansas City So. Ry. v. Albers Comm. Co., 223 U. S. 573, 32 Sup. Ct. 316, 56 L. Ed. 556; Robinson v. Balt. & O. R. R. Co., 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; Carson Lumber Co. v. St. Louis & S. F. R. Co. (D. C.) 198 Fed. 315.

"As the duty of the plaintiff to charge and collect the regularly established and published rate in this action from defendant, and the corresponding obligation of the defendant to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act and not from any contract between the parties, this court has jurisdiction, and the motion to dismiss must be overruled and denied."

We submit that there can be no distinction of principle between the carrier's duty to collect an undercharge and its duty to collect the entire charge.

In M'Goon v. Northern Pacific Ry. Co., 204 Fed. 998, hereinbefore referred to, it was held that a suit by a shipper against a railway company to recover for damage or injury to property while being transported in interstate commerce is one arising under the Interstate Commerce Act of Feb. 4, 1887, as amended, of which a federal District Court is given original jurisdiction by Judicial Code, section 24, paragraph eighth, and that such a case may be removed into the federal court, although it involved less than $3,000.00.

In Ill. Cent. R. Co. v. Segari & Co., 205 Fed. 998, plaintiff brought its action in the District Court of the United States for the Eastern District of Louisiana, to recover the sum of $12.87 as an undercharge. The defendant challenged the jurisdiction of the court. In disposing of this question, Judge Foster, after quoting the provisions of paragraph eighth of section 24 of the Judicial Code, said:

> "By the proviso of paragraph one of the same section (24), it is not necessary that such suits should involve an amount exceeding $3,000.00. Being based on a law of the United States, diversity of citizenship is also unnecessary. I am of the opinion that a suit by a railroad to recover undercharges on interstate freight is one arising under the interstate commerce laws. Therefore, this court has jurisdiction."

Smith v. Atchison etc. Ry. Co., 210 Fed. 988, was an action by a shipper against the railway company for damages, attorney's fee and penalty growing out of an interstate shipment. The parties to the action

were each and all citizens of the state of Kansas. Defendant caused the suit to be removed from the state court, in which it was brought, into the Federal District Court of Kansas. Plaintiff moved to remand. The court held that jurisdiction attached in the federal court by the removal taken because the action was one arising under the Interstate Commerce Act, and for that reason jurisdiction was conferred by section 24 of the Judicial Code.

"2. A suit arising under a law of the United States is no less removable to a federal court because the law involved has already been decided, construed and settled by the United States Supreme Court.

"3. In a shipper's action for nondelivery of an interstate shipment, defendants filed in the state court in which the action was brought a motion for an order removing the case to the United States District Court, and such motion was denied, whereupon the moving defendants filed a certified transcript of the record in the United States District Court. Plaintiff was proceeding in the state court, and had procured an order requiring the defendants to plead before a day fixed, and the defendants thereupon filed a bill in the federal court to enjoin plaintiff from proceeding in the state court, and applied for a temporary restraining order restraining further proceedings in the state court pending the hearing of the questions presented by the bill. *Held,* that the application for the restraining order was appropriate and justified, and should have been granted."

Headnotes to the case of Alabama G. S. Ry. Co. v. American Cotton Oil Co., 229 Fed. (5th C. C. A.) 11.

The opinion sustains the headnotes in every particular and is also illuminative as to the liability of the initial carrier pursuant to the provisions of the Carmack Amendment, as also when a case arises under a federal law.

The court construed paragraph eighth of section 24 of the Judicial Code as conferring additional jurisdiction upon the district courts of all suits and proceedings arising under any law regulating commerce.

In Wells-Fargo & Co. v. Cuneo, decided Feb. 10, 1917, 241 Fed. 726, it is held that an action for freight charges on an interstate shipment is an action arising under an Interstate Commerce Act giving the Federal District Court original jurisdiction of a suit where the amount in controversy is but $780.70.

The conclusion of the court is based upon the law charging the Interstate Commerce Commission with the enforcement of the Act to regulate commerce, and that since the rates are fixed by the Interstate Commerce Commission, every action to recover freight is therefore based upon the Act itself.

At page 727 the court said:

> "It is urged that in this action there is no question as to an overcharge for freight, and that no question involving the construction of the Interstate Commerce Act has arisen. I, however, agree with the opinion expressed by Judge Amidon in the case of McGoon v. Northern Pacific Ry. Co. (D. C.), 204 Fed. 998, that where a federal law creates a right of action and 'a suit is brought to

enforce that right, such a suit arises under the law creating the right.' Where the complaint is based upon a contract between parties that only remotely depends upon federal law, the action should be brought in the state court.

The opinion of Judge Reed in the case of Storm Lake Tub & Tank Factory v. Minn. & St. Louis Ry. Co. (D. C.), 209 Fed. 895, is an interesting discussion, in which the court reaches the opposite view. I think, however, the weight of authority and the best reasoned cases support the jurisdiction of the court to entertain this action. McGoon v. No. Pac. Ry. Co. (D. C.), 204 Fed. 998; A. T. & S. F. Ry. Co. v. Kinkade (D. C.), 203 Fed. 165; Ill. Cent. R. R. Co. v. Segari (D. C.), 205 Fed. 998; Smith v. A. T. & S. F. Ry. Co. (D. C.), 210 Fed. 988; Ala. etc. Ry. Co. v. American Cotton Oil Co., 229 Fed. 11, 143 C. C. A. 313. The motion to dismiss is denied."

The opinion of Judge Hand written in the above case is followed by District Judge Mayer in the case of Wells-Fargo & Co. v. Cuneo, decided April 9, 1917, 241 Fed. D. C. 727.

The question as to the liability assumed for baggage arose in New York C. & H. R. R. Co. v. Beham, 242 U. S. 148, 61 L. Ed. 210. A judgment for $1771.52 had been affirmed by the Kansas City Court of Appeals. The Supreme Court entertained jurisdiction of the case because the transactions related to interstate commerce, and because of consequent rights and liabilities incumbent upon acts of Congress, agreement between the parties, and common law principles accepted and enforced in the federal courts. In this case

it is also held that in order to determine the liability assumed for baggage, recourse might be had to the tariff schedules applicable on file with the Interstate Commerce Commission, and that the carrier had a federal right not only to a fair opportunity to put these in evidence, but also that when they were before the court they should have been given due consideration.

In Pennsylvania R. Co. v. Olivit Bros., 243 U. S. 574, 61 L. Ed. 908, a number of actions were consolidated, each action expressed in a number of counts, and each count praying for the recovery of the sum of $500.00 for the value of a consignment of watermelons alleged to have been wholly lost or delivered in bad or damaged condition. A motion was made in the Supreme Court to dismiss on the ground that no federal question appeared in the record, or, alternatively, if one appeared, it was without merit. In support of the contentions, it was said that the questions in the case were:

> "(1) Whether, it being stipulated that plaintiff was the holder of the bills of lading, it was the owner of the melons at the time the shipments were made;
>
> "(2) Whether there was any evidence of negligence of defendant which should have been submitted to the jury; and
>
> "(3) Whether plaintiff was entitled to recover the freight paid by it."

In disposing of the motion to dismiss, the court, speaking through Mr. Justice McKenna, said:

> "The first question involves the Carmack Amendment; and, considering it, the Court of

> Errors and Appeals decided that 'any lawful holder of a bill of lading issued by the initial carrier pursuant to the Carmack Amendment * * * upon receiving property for interstate transportation, may maintain an action for any loss, damage or injury to such property caused by any connecting carrier to whom the goods are delivered.' Citing Adams Express Co. v. Croninger, 226 U. S. 491.
>
> "We are not prepared to say that a contest of this view is frivolous, and the motion to dismiss is denied. Besides, it is contended that the shipments having been in interstate commerce they are subject to and governed by the Interstate Commerce Act."

And in Western Transit Co. v. Leslie & Co., 242 U. S. 448, 61 L. Ed. 423, the question presented was whether a shipper was entitled to the full value of certain copper lost, amounting to $271.38, or whether the carrier's contention should be upheld that the damages recoverable were limited to $94.10.

The Supreme Court reviewed the judgment of the Supreme Court of the state of New York and held that the release valuation clause in an interstate bill of lading when based upon a difference of freight rates was valid.

The question must have been under federal law, else in view of the amount in controversy the Supreme Court would not have entertained jurisdiction.

In St. Louis Ry. Co. v. Starbird, decided April 30, 1917, 243 U. S. 592, 61 L. Ed. 917, the court said:

> "A case is reviewable in this court where any title, right, privilege or immunity is claimed under a statute of the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed by either party under such statute."

In Central R. Co. of New Jersey v. Hite *et al.,* 166 Fed. 976, it is held that a Circuit Court of the United States has jurisdiction to determine in the first instance the question of the indebtedness of a shipper to a railroad company for demurrage under the rules adopted by the company and filed with the Interstate Commerce Commission.

Lyne v. Delaware etc. R. Co., 170 Fed. 847, is authority for the proposition that a shipper may maintain an action at law in the federal courts under the Interstate Commerce Act of February 4, 1887, to recover damages from an interstate railroad company because of the giving of a preference or advantage to another shipper.

In Hite *et al.* v. Central R. of New Jersey, 171 Fed. (3rd C. C. A.) 370, it is held that a Circuit Court of the United States has jurisdiction to determine in the first instance the indebtedness of a shipper to a railroad company for demurrage under the rules adopted by the company and filed with the Interstate Commerce Commission, where it depends on the construction, and not on the reasonableness or unreasonableness, of such rules, although the latter question is one primarily for the Commission.

In Darnell, Inc., v. Illinois Cent. R. Co., 190 Fed. 656, the rule is stated that jurisdiction of claim for damages against an interstate carrier because of excessive rates charged and collected by it from the claimant is expressly limited by the Interstate Commerce Act of February 4, 1887, to the Interstate Commerce Commission or a District or Circuit Court of the United States, and that the provision of section 16 of the Act, as amended by the Act of June 18, 1910, c. 309, sec. 13, 36 Stat. 554, extending such jurisdiction to the state courts, applies, by its terms, only to claims which have been previously determined by the Commission, and on which it has made awards which have not been complied with.

In Georgia etc. R. Co. v. Blish Milling Co., 241 U. S. 190, 60 L. Ed. 948, it is held that the question as to the proper construction of a bill of lading for an interstate shipment issued under the Carmack Amendment is a federal one which will sustain the appellate jurisdiction of the federal Supreme Court over a state court.

Questions raised for decision by conflicting contentions are usually important to the parties litigant. But, in this case, there is the question of *public importance* as well. If parties feel that uniformity of decision can best be secured by instituting cases of this character in the federal district courts, and thereby more effectually accomplish the object and purpose which actuated Congress in taking possession and legislating with respect to interstate commerce, the federal courts, we feel quite sure, will willingly assume jurisdiction of a case without regard to the amount in controversy

where the facts as here present a question of federal law.

As was said by Chief Justice Marshall and delivered in the opinion of the court in the great case of Cohens v. Virginia, 6 Wheat 264 (p. 291):

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment and conscientiously to perform our duty."

Yazoo v. Zemurray (5th C. C. A.), 238 Fed. 789, upon the strength of which the trial court made and filed its conclusions of law herein, does not unequivocally decide that an action for freight may not be maintained in the federal District Court by a carrier against a shipper where the amount involved is less than $3,000.00. All that can be claimed for the decision is that the court on its own motion expressed some doubt with regard to the question. For aught that appears, no allegation was contained in the complaint as a basis for the claim of right or privilege under any federal

law relating to interstate commerce. The case was disposed of both in the trial court and the Circuit Court of Appeals on the theory that the railroad company had in some manner estopped itself from successfully asserting a claim against the shipper, because it might have collected its freight bill had it sued the consignee therefor, and that it would be inequitable to permit the carrier " 'to change its base and proceed against the consignor, who was only technically liable.' "

We submit that in the language of Judge Hand in Wells-Fargo & Co. v. Cuneo, *supra,* "the weight of authority and the best reasoned cases support the jurisdiction of the court to entertain this action."

III.

The Statute of Limitations.

Was this action barred by the provisions of subdivision one of section 338 of the Code of Civil Procedure of the state of California, and also by the provisions of subdivision one of section 339 of said Code?

Subdivision one of section 338 refers to an action upon a liability created by statute other than a penalty or forfeiture, and must be commenced within three years after the action accrues.

Subdivision one of section 339 of said Code requires an action upon a contract, obligation or liability not founded upon an instrument in writing to be commenced within two years.

The reasonable construction of the Interstate Commerce Act is that the railway company is required to

exhaust its legal remedies before unpaid freight charges can be written off to "Loss and Gain." Congress has not enacted any statute of limitations on the subject. But conceding, *arguendo,* that the time within which this action must be commenced was controlled by the laws of the state of California on that subject, it is submitted that this action is not within the purview of the statute cited in the demurrer and relied upon by defendant in error.

In the first place, this is not an action upon a liability created by a statute of the state of California. Therefore, subdivision one of section 338 of the Code of Civil Procedure of that state is wholly eliminated from the inquiry.

Subdivision one of section 339 of the Code of Civil Procedure of that state can have no application whatsoever, because that statute has reference to an action upon a contract, obligation or liability not founded upon an instrument in writing. So that if, for the purpose of considering the statute of limitations, we treat the bill of lading in this case as a contract forming the basis of the action, we are dealing with an action founded upon an instrument in writing.

Subdivision one of section 337 of the Code of Civil Procedure of the state of California provides that "an action upon any contract, obligation or liability founded upon an instrument in writing executed within this state * * *" shall be commenced within four years.

For the purposes of the demurrer it is admitted that the action was brought within four years from the time the oranges were shipped. It is admitted that

at the time the oranges were shipped a written bill of lading was issued by the initial carrier. It is admitted that by the provisions of section 8 of the bill of lading (18) the owner or consignee is required to pay the freight and all other lawful charges accruing on the property involved in the shipment. The section is as follows:

> "Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped." (18)

Counsel for the defendant in error urged upon the attention of the trial court, and doubtless will urge upon the attention of this court, that since there is no allegation in the complaint that the defendant in error was the owner of the property, and since the original consignee named in the bill of lading was James A. Coogan, therefore, the defendant was neither the owner nor consignee, and hence, his legal liability, if any there was, for the freight and transportation charges arises by implication of law only.

But, it is shown on the authority of Georgia etc. R. Co. v. Blish Milling Co., *supra,* that this position is untenable. In that case the court held that in an interstate shipment the bill of lading is the contract which controls and governs the entire transportation and fixes the obligations of all participating carriers

to the extent that the terms of the bill of lading are applicable and valid.

It will be observed from reading paragraph III of the complaint (7) that after the oranges had been consigned and received by the initial carrier for transportation, the defendant in error reconsigned them to Wichita, Kansas, and thereafter, and from time to time, different diversion orders were given by the defendant in error and acted upon by the carriers, so that as a matter of fact, after the oranges were received by the initial carrier for transportation, the defendant in error, by its diversion orders, thereby assumed full charge and control of the property and was both shipper and consignee. This because, according to the allegations of the complaint, which for the purposes of the demurrer are deemed to be admitted, delivery at the several intermediate points referred to in the complaint was made to the defendant in error as shipper and as consignee (8, 9). As such consignee, the defendant in error had expressly agreed by the provisions of the bill of lading to pay such transportation charges (18).

The shipment moved under the written bill of lading. The defendant in error delivered the oranges to the initial carrier and assumed full control of the property. As was said in the case of A. T. & S. F. Ry. Co. v. Stannard & Co., 162 Pac. 1176, "*whether the shipper or the consignee is primarily liable between themselves for the freight charges is no concern of the railway company. Since the shipper is the person who deals with the railway company and the one who*

induces the carrier to perform the transportation service, he is liable absolutely."

Seaboard Air Line Ry. v. Luke, 90 S. E. (Ga.) 1041, was an action commenced by the railway company to recover an undercharge growing out of the shipment of a carload of automobiles. A uniform interstate bill of lading was issued covering the shipment. On the back of the bill of lading so issued was the following provision:

> "Section 8. The owner or consignee shall pay the freight, and average, if any, and all other lawful charges accruing on said property."

(The court will note that this provision corresponds to section 8 of the bill of lading (18) in the instant case.)

After certain proceedings were had in the justice's court the action was dismissed by the judge of the Superior Court on the ground that the action was barred by the statute of limitations, it having been brought within six years, but more than four years after the right of action accrued.

The court held in that case that this code section was binding upon the carrier and the shipper, and also binding upon the consignee or the "order-notify" consignee, and that the suit was not barred because not brought within four years, and that the lower court erred in failing to render a final judgment for the plaintiff.

The court decides that a bill of lading is a written contract controlling all the parties concerned in the

shipment and governing the entire transaction. The court cites, among other cases,

Georgia etc. Ry. v. Blish Milling Co., 241 U. S. 190;

McElveen v. Southern Ry. Co., 109 Ga. 249, 34 S. E. 281;

Hutchinson on Carriers (3rd Ed.), section 157.

In the case of Texas & P. Ry. Co. v. Williamson & Co., 187 S. W. 354, it is held that a through bill of lading is a contract in writing within the meaning of Texas Revised Statutes 1911, article 5688, subdivision 1, providing that actions for debt or contracts in writing shall be commenced within four years.

In the case of Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998, the court, speaking through Mr. Justice Miller, said:

> "A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. * * *
>
> "It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver."

The above language is quoted with approval in the case of St. Louis etc. R. Co. v. Knight, 122 U. S. 79, 30 L. Ed. 1077, and in which the court further says:

"And the doctrine is applicable to transportation contracts made in that form by railway carriers and other carriers by land as well as by sea."

To the same effect, see

Friedlander v. Texas etc. R. Co., 130 U. S. 426, 32 L. Ed. 994.

In 4 Am. & Eng. Ency. of Law, 2nd Ed., at page 521, it is said that:

"Although the primary office and purpose of a bill of lading is to express the terms of the contract between the shipper and the carrier, it partakes of the twofold character of a receipt and a contract; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract as to the transportation and delivery of the goods to the consignee or other person therein designated and upon the terms therein specified."

Among the cases cited to support the text are:

Pollard v. Vinton, 105 U. S. 7;

St. Louis etc. R. Co. v. Knight, *supra.*

"The office of a bill of lading is to embody the contract of carriage as well as to evidence the receipt of the goods; and when the shipper accepts it without objection before the goods have been shipped, and permits the carrier to act upon it by proceeding with the shipment, it is to be presumed that he has accepted it as containing the contract, and that he has assented to its terms except, as we have seen, insofar as it undertakes to limit the general liability of the carrier."

Central R. & B. Co. v. Hasselkus, 17 S. E. (Ga.) 838.

"A bill of lading is a written acknowledgment, signed by the master, that he has received the goods therein described from the shippers, to be transported on the terms therein expressed. It is a receipt for the quantity of goods shipped and a promise to transport and deliver them as therein stipulated."

The Tongoy, 55 Fed. 331.

"A bill of lading is a contract including a receipt."

O'Brien v. Gilchrist, 34 Me. 554;

Babcock v. May, 4 Ohio (4 Ham.) 334;

Stapleton v. King, 33 Iowa 28;

Davis v. Central Vt. R. Co., 29 At. 313.

A bill of lading when signed by the carrier and delivered to and accepted by the shipper without objection; in the absence of fraud, constitutes the contract of carriage, and binds the shipper, *though not signed by him;* and a stipulation stamped on the face of the bill of lading before its delivery to the shipper by its express terms included therein becomes a part of the contract.

The Henry B. Hyde, 82 Fed. 681.

IV.

The Complaint Is Not Vulnerable to Demurrer on Grounds of Uncertainty.

It is contended that the complaint is uncertain in that it cannot be ascertained therefrom with whom defendant in error contracted, both for the shipment of the goods and the payment of freight, or to whom

defendant in error agreed to pay the freight charges on the shipment. (23)

It is further suggested by the demurrer that it cannot be ascertained whether the claim asserted arose out of an express contract in writing, a parol agreement, or by operation of law.

We submit that all of these contentions are beside the question and rendered wholly immaterial in view of the provisions of the Carmack Amendment and the construction placed thereon by the Supreme Court of the United States in the cases to which we have already drawn attention.

The liability of the defendant in error herein is fixed by the provisions of the Acts of Congress relating to interstate commerce, as certain and as definite as is possible for law to create obligation and liability.

The law on this subject is admirably and concretely stated in the headnotes to the case of A. T. & S. F. Ry. Co. v. Stannard & Co., 162 Pac. 1176, as follows:

> "1. A shipper who induces a railway company to transport a shipment of freight in interstate commerce is liable for the lawful freight charges thereon.
>
> "2. Since the adoption of the Interstate Commerce Act and its later amendments, it is unavailing as a defense to an action for the charges on an interstate freight shipment that the shipper had long been a patron of the railway company and had a special understanding and custom in his dealings with the company whereby the carrier was to be the agent of the consignee as to all shipments delivered by defendant, and that he

guaranteed the freight charges only upon condition that he should be promptly notified by the carrier if any consignee refused to accept a shipment and refused to pay the freight charges thereon.

"3. All special arrangements, agreements, customs and understandings between individual shippers and interstate railroads, not open to all similar shippers on equal terms, nor on file with the Interstate Commerce Commission nor sanctioned by that tribunal, are void, and a defense to an action for interstate freight charges based thereon is subject to demurrer or motion for judgment."

In that case the court, by placing its construction on the Interstate Commerce Act and the rules and orders promulgated by the Interstate Commerce Commission pursuant to its terms, determines that a railway company has no choice but to demand the freight charges from the shipper if they are not paid by the consignee, and the railway company is required to exhaust its legal remedies before the unpaid freight charges can be charged off to "Loss and Gain."

The court, in commenting on this branch of the case, said:

"The situation of the railroad is not unlike that of a public tax collector. If a tax is not paid, a tax warrant must issue, and the processes of law must be set in motion, one after another, so long as there is the slightest chance to collect it.

"Whether the shipper or the consignee is primarily liable between themselves for the freight charges is no concern of the railroad company. Since the shipper is the person who deals with the

railway company and the one who induces the carrier to perform the transportation service, he is liable absolutely. Portland Flouring Mills Co. v. British & F. M. Ins. Co., 130 Fed. 860, 65 C. C. A. 344; Baltimore etc. R. Co. v. New Albany Box etc. Co., 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28; Baltimore & Ohio Railroad Co. v. La Due, 128 App. Div. N. Y. 594, 598, 112 N. Y. Supp. 964; 2 Moore on Carriers, 669."

The court's conclusion must be predicated upon the provisions of the Carmack Amendment, because we have seen that prior to the passage of that Act the railway company and the shipper were left largely to their private contracts. Now all such rules, regulations and agreements must be framed in terms applying to all shippers alike or affecting them in some general and reasonable classification which do not offend against the anti-discrimination features of the Interstate Commerce Act, and approved by the Interstate Commerce Commission.

For these reasons it is respectfully submitted that the trial court committed error calling for reversal in sustaining the demurrer and giving judgment providing for the dismissal of the action.

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